**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

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| Establishment of Rules Governing | ) | |
| Procedures to be Followed When | ) | |
| Informal Complaints | ) | CI Docket No. 02-32 |
| Are Filed by | ) | |
| Consumers Against Entities Regulated | ) | |
| by the Commission | ) | |

# REPLY COMMENTS OF MORALITY IN MEDIA, INC.

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To: The Commission

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## I. INTRODUCTION

Morality In Media submits these Comments in reply to the Comments of the National Association of Broadcasters (NAB) for the purpose of demonstrating that the allegations of the NAB, suggesting that the present procedure of the FCC regarding indecency and obscenity may not be in any way deficient, is in error. Violations of 18 U.S.C. 1464 in radio and TV broadcasting have escalated, and while there is nothing wrong with the statutes, the deficiency exists in the failure of the FCC to utilize the same and properly enforce its requirements. It is in this area that the existing procedure is woefully deficient in application by the FCC and needs revitalization. However, we do not agree, as indicated below, that the procedure outlined in Docket No. 02-32 will cure the existing

deficiencies. We therefore oppose the Proposal to substitute an Informal-Formal approach without also retaining the existing procedure revitalized.

## II. RESPONSES TO NAB ASSSERTIONS

*The Present Complaint Procedure is Deficient*

Morality In Media submits that the present complaint procedure, as applied, is deficient and inadequate to fulfill the Commission's responsibilities. In other words, it just does not work. While a revitalized approach is warranted, we reject that outlined in the NPRM as a substitute.

The current procedure of the FCC, up until recently, and possibly continuing, was to label an indecency complaint received from the public as "Defective" unless accompanied by a tape or transcript of the programming. This violates the letter and spirit of 18 U.S.C. 1464 and 47 U.S.C. 303(g).

That requirement of the FCC, combined with the FCC's refusal to;

- Request a tape or transcript from a licensee
- Use its subpoena power to obtain a tape
- Initiate an inquiry on its own motion
- Monitor programming on its own and make tapes as evidence of a violation

has virtually insured that 18 U.S.C. 1464 and 47 C.F.R. 73.3999 will not be enforced.

Both Commissioners Tristani and Copps have indicated that they consider the FCC's approach inadequate to fulfill FCC responsibilities.

The existing procedure of the FCC for "Complaints about Broadcast of Obscene or Indecent material," found on the Internet, is still woefully inadequate and is the old procedure in disguise.

Instead of changing the procedure in an efficient manner, that procedure says:

1. "The Commission's enforcement actions… are based on documented complaints of obscene or indecent or obscene broadcasting received from the public."
2. "If the complaint does not contain information sufficient to suggest a violation may have occurred, the complaint will be dismissed."
3. "The Commission asks Complainants to provide the following information"
   - "The details of what was actually said (or depicted)."
4. "General descriptions without a detailed explanation of what was actually stated or depicted are generally not sufficient."

It may be seen from the above quotations that the FCC will not, at present, use its authority to request a tape from the station, use its subpoena power to obtain the same, initiate an inquiry without unusual circumstances, or monitor the station-- all within its power to do.

The FCC has thus told the consumer, You must make a prima facie case. We note that it is the obligation of the FCC to enforce the law, and not that of the individual consumer. Cf. Monroe Communications v. FCC, 900 F.2d 351 (D.C. Cir. 1990).

The statistics show that the present system of issuing a Notice of Apparent Liability (NAL) does not work because there is inadequate follow-up. When the FCC issues a Notice of Apparent Liability and assesses a forfeiture, what happens? Section 503 of the Communications Act provides in part:

> *In any case where the Commission issues a Notice of Apparent Liability looking toward the imposition of a forfeiture under this act, that fact shall not be used, in other proceeding before the Commission, to the prejudice of the person to whom such notice was issued, unless (i) the forfeiture has been paid, or (ii) a Court of competent jurisdiction has ordered payment of such forfeiture and such order has become final.*

Obviously, the stations are aware of the statute and its penalties. They also know that the chances of being required to pay such a forfeiture are nil. In 1997, four cases arose where the licensee did not pay and all were cancelled or withdrawn by the FCC.

A radio or television station looking at this record may very well conclude; "Sit on your hands, it will go away."

In three recent cases indicated below, either the FCC or the Justice Department let the statute of limitations run. Soon thereafter, the FCC rescinded its Notices of Apparent Liability (NAL) "Because a significant amount of time has elapsed since the broadcast of this material". In other words, the five-year statute of limitations has passed.

In Re Flambo, the five-year statute had run. The NAL was issued in 1994 and rescinded in the year 2000. Re Sagittarius involved a broadcast in 1995, and an NAL of 1997. A rescission was ordered in 2001. Again, in Re American Las Vegas Ltd, the NAL was issued in 1993 and 1994 and rescinded in the year 2000.

With this record, the concerns of the NAB, that the Commission's current complaint process may not be deficient, fade. The above noted statistics are reported from FCC sources and prove the deficiency of the present procedure, which amounts to a free ride for NAB members and others facing an informal complaint who refuse to pay.

Now what happens in instances where the FCC does refer a matter to Justice to collect a forfeiture? There have been three such referrals in recent years (1999-2001). The FCC is aware that these matters were referred, but even after a Freedom of Information request to Justice to determine if the suit was instituted and the status of the matters (dated August 13, 2001), Justice has, to this date, failed to supply the requested information. Morality in Media did learn of one such matter where WYBB (FM) of Folly Beach, South Carolina was "dismissed". The disposition of the other two remains a mystery. While the reason for the dismissal is not yet known, we believe that there is a guideline at Justice not to pursue matters where the cost of collection will exceed the amount of the fine. It can be seen that the cost of collection in a vigorously defended

Federal Court case against a moneyed corporation with the distinct possibility of an appeal will exceed the miniscule nominal fine of $7,000 usually imposed.

Obviously, not only does the forfeiture of $7,000 have to be increased, but, since the nominative plaintiff is the FCC, no forfeitures should be dismissed by Justice without the consent of the FCC because the cost of collection exceeds the amount of the forfeiture. Moreover, forfeitures should not be dismissed for any other reason, without the consent of the General Counsel of the FCC, otherwise the weak house of cards called the enforcement procedure will suffer further collapse without even requiring any movement by the attorney for the station involved. We note that under Section 503 there is no discretion in the Attorney General not to sue. The statute says he "shall" recover the amount assessed.

Morality In Media knows of no case that has ever been prosecuted by the Justice Department to a determination in the last seven years after the FCC has issued a NAL and sent the same to Justice.

In light the above, the NAB's implication that the current complaint process may not be deficient, is obviously erroneous.

In addition, it is apparent that the initial fine needs to be increased to the $25,000 permitted by section 503, and that the FCC should begin using subpoena power to obtain a tape or transcript in instances where a complaint indicates that the law may have been violated.

As some commentators have noted, to expect a member of the public to tape a program or to provide a transcript that is indecent after they have been assaulted (a fact accompli), is ludicrous. The obligation is on the FCC to investigate and subpoena a tape or transcript when given a reliable indication that the law has been violated, whether or

not the consumer presents a tape, transcript or "significant excerpts". Is a member of the public to be required to anticipate that the law will be violated and therefore be ready with pencil or recording machine in hand?

## III. THE NEED FOR RE-REGULATION DOES EXIST

According to the NPRM, the FCC intends to abandon the present system and substitute an Informal-Formal Complaint System now used under Section 208. While the NAB objects that the FCC has not demonstrated a need for re-regulation of broadcast programming, the above Comments in Section II demonstrate that need and necessity. Morality in Media suggests, however, that the remedy is for the FCC to use the full powers that it already has, adopting the suggestions for improvement offered in Section II above.

Morality in Media does not object to the concept that the consumer attempt to resolve his or her complaint informally with the station, and to the extent that it could be made to co-exist with the existing procedure, the policy may indeed prove helpful. We therefore recommend that it exist side by side with the present complaint procedure, and that the present complaint procedure be vigorously enforced. In such an instance, Morality in Media could support many of the approaches utilized in 02-32.

The contentions of the NAB, that the terms "Objectionable Material" and "Compel a Public Apology" may be improper, are easily answered. "Objectionable Material," in the context in which it is used, refers to only obscene or indecent. The public apology aspect is not compelled, but is purely voluntary.

## IV. CONCLUSION

We believe that the NAB suggestion, that the present procedures have not been shown to be deficient, is erroneous. The remedy however, is not to eliminate the existing procedure, but instead, to add a new weapon to the consumer's arsenal and to require the FCC to make full use of its existing power to enforce forfeitures.

The obvious problem of substituting 02-32 for the existing process is demonstrated by analyzing the usual scenario under that rule. Viz. The consumer (member of the audience) views or hears an obscene or indecent program. He or she then files an informal complaint explaining that he or she believes that the program was indecent or obscene. In such a scheme, what possible adequate remedy can the station offer? "I'm sorry" is not good enough. [As opposed to a complaint regarding an exorbitant rate by a common carrier, where a refund is a satisfactory remedy.] The only appropriate answer is some compulsion or some punishment, which can only be achieved by using the statutory procedure spelled out in Section 503.

A real question arises as to the legal authority of the Commission to abrogate that procedure and substitute its own. If the existing procedure is reinvigorated and continues to exist side by side with the 02-32 procedure, both could sail.

Another consideration is the burden that the 02-32 procedure, outlined in NPRM, places upon the consumer to file Formal Complaints where informal complaints are rejected. First, such a complainant will probably require a lawyer to do so. As the National Cable and Telecommunications Association explains in their comments;

> *"The common carrier formal complaint regulations contemplate potentially time-consuming, expensive and burdensome processes. These*

*include document discovery, depositions, written interrogatories, status conferences, motion practice, and concluding briefs."*

Subjecting the ordinary citizen to those and related processes is an inordinate expensive burden and will let the offending station go Scot-free. Further, what would such a complainant say? What redress may be obtained? What may be accomplished with a program that is now gone. An apology is no remedy. 02-32 requires an ordinary citizen to enforce a law that is an obligation of the FCC.

In sum, we oppose various comments of the NAB and we support the adoption of the NPRM procedure, so long as the existing procedure, in a revitalized fashion, continues alongside the new.

Respectfully submitted,

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